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IN THE

Supreme Court of the United States

October Term, 1965

OCTAVE HOWARD, *Petitioner*

v.

STATE OF TEXAS, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

OCTAVE HOWARD, *Petitioner*

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To The Honorable Court:

Petitioner, OCTAVE HOWARD, Prays that a writ of certiorari issue to review the Judgment of the Court of Criminal Appeals of Texas affirming his conviction for carrying a pistol, with two prior convictions being alleged in the information for enhancement purposes.

OPINION BELOW

The Court of Criminal Appeals Opinion, dated February 10, 1965, 387 S.W.2d 387, is reproduced as Appendix "A" to this Petition.

JURISDICTION

The date of the judgment sought to be reviewed is dated February 10, 1965. (R. 138)

A motion for rehearing was overruled on the 17th day of March, 1965, without a written opinion. (R. 143, 149)

The statutory provision believed to confer jurisdiction on this Court to review the Judgment or Decree in question by writ of certiorari is 28 U.S.C.A. Sec. 1257(3).

QUESTION PRESENTED FOR REVIEW

In a criminal prosecution for unlawfully carrying a pistol, can the State of Texas read to the jury at the commencement of the trial allegations as to two prior similar convictions, and elicit evidence thereon before a finding of guilt or innocence on the primary offense without abridging the Defendant's rights to a fair trial before an impartial jury secured him by the 6th and 14th Amendments to the United States Constitution?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Sixth Amendment to the United States Constitution reads verbatim as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Section One of the Fourteenth Amendment reads verbatim as follows:

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article 483 of the Texas Penal Code, 1 V.A.T.S. Penal Code, reads verbatim as follows:

Any person who shall carry on or about his person, saddle, or in his saddlebags, or in his portfolio or purse any pistol, dirk, dagger, slung shot, blackjack, hand chain, night stick, pipe stick, spear, knuckles made of any metal or any hard substance, bowie knife, switch blade knife, spring blade knife, throw blade knife, a knife with a blade over five and one-half (5½) inches in length, or any other knife manufactured or sold for the purpose of offense or defense shall be punished by a fine of not less than One Hundred Dollars ($100) nor more than Five Hundred Dollars ($500) or by confinement in jail for not less than one (1) month nor more than one (1) year.

Article 61 of the Texas Penal Code, 1 V.A.T.S. Penal Code, reads verbatim as follows:

If it be shown on the trial of a misdemeanor that the defendant has been once before convicted of the same offense, he shall on second conviction receive double the punishment prescribed for such offense in ordinary cases, and upon a third or any subsequent con-

viction for the same offense, the punishment shall be increased so as not to exceed four times the penalty in ordinary cases.

STATEMENT OF THE CASE

Petitioner was charged in the County Criminal Court at Law No. 3, Harris County, Texas, with unlawfully carrying a pistol, with two previous convictions being alleged in the information. (R. 2, 3) Appellant was convicted by a jury and he was given four (4) years in the County Jail. (R. 12)

Before trial, Petitioner moved to quash the information as to the two prior convictions. (R. 5, 6) This motion was denied by the trial court (R. 7) and the trial proceeded, whereupon the information, in its entirety, was read to the jury.

Evidence was elicited by the prosecutor not only as to the instant offense for which he was on trial, e.g., carrying a pistol, but also as to the two prior convictions.

After conviction, upon appeal to the Court of Criminal Appeals of Texas, the only and last Court of resort open to Petitioner under Texas practice, Petitioner raised and briefed and argued orally the question presented for review. The Court disposed of the question thusly,—Quoting from the Court's opinion:

> "Appellant complains of the overruling of his motion to quash the information upon the ground that the reading of the allegations of the prior convictions to the jury would be so prejudicial that he could not receive a fair trial.

> "The complaint is further urged that Appellant was in fact deprived of a fair trial by reason of the allegation and proof of his prior convictions for carrying a pistol. The State may allege and prove a previous conviction for the purpose of enhancing the punishment under the applicable enhancement statute.,"citing authority.

The question was again raised in Petitioner's Motion for A Rehearing, (R. 143) which motion was overruled without a written opinion on the 17th day of March, 1965. (R. 149)

REASONS FOR ALLOWANCE OF THE WRIT

The Supreme Court has never passed on this precise question.

All but a handful of States have such statutes on the books and most apply the statutes in the same manner as Texas; that is, the States allege the prior convictions in the information; or indictment, read the indictment to the jury, then elicit evidence thereon in front of the jury, and this procedure is followed before the jury returns a verdict on the offense for which the defendant is on trial.

In an identical question presented to the Fourth Circuit in *Lane v. Warden*, 320 F.2d 179, the question was answered "no".

The United States Court of Appeals for the Fifth Circuit in *Breen v. Beto*, 341 F.2d 96 answered the question "yes".

Petitioner would take the same position as did the petitioner in the *Lane* case.

CONCLUSION

For the reasons stated, Petitioner respectfully prays that this court issue its writ of certiorari to the Court of Criminal Appeals of Texas for review of that court's judgment in this matter.

Respectfully Submitted,

_____

Octave Howard, Petitioner

_____

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Of Counsel

APPENDIX "A"

OCTAVE HOWARD, Appellant

No. 37,763 vs. --- Appeal from Harris County

THE STATE OF TEXAS, Appellee

OPINION

The offense is unlawfully carrying a pistol; the punishment, enhanced by two prior convictions for like offense, four years in jail.

The sufficiency of the evidence is questioned.

The prior convictions for carrying a pistol alleged in the complaint and information were proved. The judgments of conviction were introduced and testimony was offered as to the identity of the defendant and the time of the commission of the offenses. On cross-examination the appellant admitted that he had been previously convicted as alleged.

Ethel Broadway testified that she saw appellant in the bedroom or midle room of her mother's home on the date alleged in the information; that he had a pistol in his hand; that he struck her; threatened to kill her and "snapped" the pistol at her. She called her mother who was in the kitchen and she came and ordered appellant to get out of the house. He said he wasn't going anywhere and started "cussing" and fighting with her. Appellant fired the pistol into the floor in the living room and the witness' sister was sent next door to call the police.

As the police were arriving at the house, appellant threw the pistol under the divan where the officers found it.

The witness Ethel Broadway testified that appellant at first told her not to tell the police "he throwed it under the divan" but that she told them where it was.

Lucille Jordan, mother of Ethel Broadway, corroborated her daughter's testimony as to appellant having the pistol in her home and firing it into the floor of her living room.

Patrolman C. B. Terpstra, of the Houston Police Department, who responded to the call to go to the address, testified that when he arrived someone called out "he has a gun."

Upon entering the house he found appellant and two women in the living room. Appellant was immediately searched after they pointed at him.

Officer Terpstra was asked and answered:

"Q. Did you find anything when you searched the defendant?
"A. Yes, sir, we found a blackjack.
"Q. Do you have it with you?
"A. Yes, sir.

"Mr. Stover: (Assistant District Attorney) I would like to have this blackjack marked for identification purposes as State's Exhibit No. 3."

Appellant's counsel then objected and his objection was sustained. He moved for a mistrial, which motion the court overruled.

It will be noticed that the evidence was before the jury before any objection was made and there was no motion or request to have the evidence withdrawn. Under such facts no reversible error is shown.

If there was any error in the trial court's rulings, it was against the state when the cautious trial judge sustained appellant's objection on the ground that "it is not the offense for which he is charged." Art. 487 V.A.P.C.; Giacona v. State, 372 S.W.2d 328; Yaffar v. State, 349 S.W.2d 730; Ross v. State, 334 S.W.2d 174.

Patrolman Terpstra further testified that Miss Broadway told him that appellant threw the pistol behind the couch and he found the pistol which was introduced in evidence there. He also testified that he saw a bullet hole in the floor of the living room; found a fired cartridge in the pistol.

Appellant testified that the pistol was one he had previously bought and given to Ethel Broadway. He denied that he took the pistol to Lucille Jordan's house or that he fired it. It was his testimony that Ethel had the pistol and her mother had a knife or dagger when they "called the law" and that Ethel handed the pistol to the police when they got there.

Appellant also denied that he threw the pistol behind the couch or that the officers found it there; that he fired the pistol into the floor; that anyone fired the pistol while he was there; that he had ever fired the gun, or that he "ever had the pistol at all out there that day."

We find no merit in the contention that appellant was not shown to have moved about with a pistol. The state offered proof that he had the pistol in his hand in the bedroom and in the living room of the home of Lucille Jordan, fired it and threw it behind the couch where it was found. Ethel Broadway testified, on cross-examina-

tion: "Q. Are you stating the defendant brought this pistol to your house? A. He brought it to the house."

The jury decided the fact issue against the appellant and we find the evidence sufficient to sustain the conviction.

Appellant's complaint as to the court's charge was not raised in his objections and exceptions to the charge, hence need not be discussed other than to observe that it relates to the prior convictions and the application of Art. 61 P.C.

Appellant complains of the overruling of his motion to quash the information upon the ground that the reading of the allegations of the prior convictions to the jury would be so prejudicial that he could not receive a fair trial.

The complaint is further urged that appellant was in fact deprived of a fair trial by reason of the allegation and proof of his prior convictions for carrying a pistol.

The state may allege and prove a previous conviction for the purpose of enhancing the punishment under the applicable enhancement statute. (Arts. 61 to 63 P.C.) Stephens v. State, 377 S.W.2d 189, and cases cited. See also Wigginton v. State, No. 37,645.

Our disposition of appellant's claim of error in the overruling of his motion for mistrial based upon the testimony to the effect that a blackjack was found in the search of the appellant's person disposes of the complaint as to the argument of the prosecuting attorney directing attention to such testimony.

No reversible error appearing, the judgment is affirmed.

Woodley, Judge.

(Delivered February 10, 1965.)